COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Massachusetts Electric Company	**)**	**D.P.U. 96-25**

INITIAL BRIEF OF THE CENTER FOR ENERGY AND ECONOMIC DEVELOPMENT

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TABLE OF CONTENTS

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INTRODUCTION

The Center for Energy and Economic Development ("CEED") submits this Initial Brief to the Department of Public Utilities ("DPU" or the "Department"). CEED opposes Part III of the Restructuring Settlement Agreement ("RSA") entitled "Protect the Environment and Conservation."[1] Part III contains three provisions, entitled "Siting Reform," "Emissions Reductions" and "Conservation and Load Management and Renewables." Each of these provisions represents flawed public policy, exceeds the authority of the DPU to adopt or both.[2]

The emission reduction provisions of the RSA, in particular, must be rejected. These provisions are directly contrary to the two key policies set forth in the DPU's May 1, 1996 order in D.P.U. 96-100 regarding how environmental quality issues should be treated in electric restructuring. The first policy is that going-forward emission control costs should not be included in stranded investment borne by ratepayers. D.P.U. 96-100, May 1,

[1] The RSA begins on page 20 of MECo-1.

[2] Other than its opposition to Part III of the RSA, CEED neither supports nor opposes the RSA. CEED's position is that if the DPU adopts the RSA, or otherwise proceeds to restructure the operations of Massachusetts Electric Company or its affiliated companies, such adoption or restructuring should not include approval of Part III of the RSA.

1996 Order at 38. The second is that new emission controls adopted through electric restructuring should be part of a regional approach applicable to other generating sources in Massachusetts, New England and upwind states. Id. at 35-36. The stated purpose of this latter policy is to assure that any such controls are environmentally effective and do not result in competitive harm to Massachusetts utilities and their ratepayers. Id. at 35-38.

Interestingly, as discussed below, the original restructuring plan proposed in this docket by Massachusetts Electric Company ("MECo" or the "Company"), entitled "Choice: New England" and submitted in February 1996, would have achieved both of these goals. MECo-2, Testimony volume, p. 78, lines 3-5 and p. 79, line 16 to p. 80, line 2. But in the negotiations leading to the RSA, these goals were tossed overboard by the settling parties. As discussed below, it was decided in the RSA that MECo's fossil fueled plants would be required to make what MECo characterizes as "deep and expensive" emission reductions with MECo ratepayers paying the cost through increased stranded investment. And, as discussed below, it was decided that MECo's fossil fueled plants would make the emission reductions even if other regional and upwind plants never become subject to the same or similar reductions.

Part III of the RSA seems to have evolved as a "marriage of convenience" among the settling parties driven by the desire of some to make sure restructuring of MECo locks in emissions reductions even at the cost of increasing the stranded investment burden of ratepayers and even if there is no assurance that the emission reductions will be part of a regional solution. With NEP[3] exiting the generating business, and with ratepayers rather than

[3] New England Power Company ("NEP") is MECo's corporate affiliate and owns and operates electric generation, including the Brayton Point and Salem Harbor units, within the New England Electric System ("NEES"). NEP and MECo are both wholly owned subsidiaries of NEES.

NEES' shareholders paying the cost of the emissions controls, MECo was willing to reverse its past opposition to emissions controls outside of a regional framework and go along with the "compromise" on environmental issues.

In asking DPU to approve Part III of the RSA, the settling parties are now asking that the Department, also, join in jettisoning the Department's basic policies as to how environmental issues in restructuring should be addressed. CEED respectfully suggests, instead, that the DPU should hold the settling parties' feet to the fire by rejecting Part III of the RSA. If there is going to be a settlement on environmental issues, it should not be based on ratepayers paying the cost of new emission controls and it should be part of a regional or national approach established by environmental regulatory bodies of appropriate jurisdiction. That is what the DPU said in its May 1, 1996 order in D.P.U. 96-100, that is what the DPU said in its August 16, 1995 restructuring principles in D.P.U. 95-30 and that is what should govern disposition of Part III of the RSA.[4]

CEED discusses each of the three sections of Part III of the RSA - emission reduction, renewables and amendment of the siting statute - in more detail below.

ARGUMENT

[4] CEED, of course, has argued to this Department previously, and continues to maintain, that this Department should have no role in requiring emission reduction at all. Environmental regulators, not public service regulators, should make environmental policy. For purposes of this brief, CEED is assuming that the Department, consistent with its previous orders in D.P.U. 96-100 and 95-30, is determined to play a role in emission reduction. CEED's comments herein should not be construed as an endorsement of any action by the Department requiring or approving emission reductions or of any of the policies set forth in D.P.U. 96-100 or 95-30 (some of which CEED specifically disagrees with). CEED certainly does not wish to imply that this Department itself could impose emission controls affecting generation in other states. The Department does not have the jurisdiction to do so. A more complete explanation of CEED's views with respect to emissions issues in Massachusetts and the Northeast is contained in footnote 12 below.

I. THE EMISSION REDUCTION PROVISIONS OF PART III OF THE RSA SHOULD BE REJECTED.

A. Overview of Emission Reduction Provisions

The emission reduction provisions of Part III of the RSA are set forth in detail in Attachment 10 of the RSA and were described in testimony of Andy Aitken on behalf of MECo (tr. vol. 2, pp. 138-195). In essence, Attachment 10 would require, in MECo's words, "deep and expensive" emission reductions at Brayton Point Units 1-4 and Salem Harbor Units 1-4.[5] Brayton Point Units 1-3 and Salem Harbor 1-3 are coal-fired, representing all of NEES's coal-fired electric generation in Massachusetts and account for fully 9% of the entire 1995 New England Power Pool utility generation. CEED-3, p. 10. All of the Salem Harbor units would be required to reduce emissions in the year 2000. Tr. vol. 4, p. 197, line 16 to p. 201, line 5. Brayton Point Unit 1 would be required to reduce emissions in 2004. Id. Brayton Point Unit 2 would be required to reduce emissions in 2005. Id. Brayton Point Units 3 and 4 would be required to reduce emissions in 2010. Id.

As set forth in Attachment 10 to the RSA and as described by Mr. Aitken, the emission reduction requirements of the RSA as to all four Salem Harbor units and Brayton Point Units 1 and 2 are not conditioned on similar emission reduction requirements being imposed on other fossil-fueled generating plants in Massachusetts, New England or in upwind midwestern states. Id. In other words, these six generating units would be required to reduce emissions regardless of whether or not other similarly situated generating units are

[5] The phrase "deep and expensive" was used by MECo witness Tranen to describe the emission reductions proposed by the Company in its original "Choice: New England" proposal. MECo-2, Testimony volume, p. 79, lines 8-9. MECo witness Aitken stated that the emission reduction provisions of the RSA are "roughly equivalent" to the emission reduction provisions to which Mr. Tranen was referring. Tr. vol. 4, p. 140, lines 7-8.

ever subjected to similar emission control requirements. Id. Only the emission reductions applicable to Brayton Point 3 and 4 would be potentially delayed if similarly situated electric generating stations owned by third parties did not become subject to additional emission controls. Id. Thus, Attachment 10 of the RSA would require emission reductions at five of NEP's six base loaded coal-fired units (Salem Harbor Units 1-3 and Brayton Point Units 1-2) regardless of whether other coal-fired plants in the region or upwind make similar reductions. Id.

Because NEP is required by the RSA to divest its non-nuclear generating assets, including the Brayton Point and Salem Harbor units, Attachment 10 of the RSA does not contemplate that the emission reduction requirements would be physically implemented by NEP. Instead, Attachment 10 contemplates that NEP, when it sells the Salem Harbor and Brayton Point units, will place a condition in the sales contracts requiring the new owner of these units to make the reductions. The new owner will, therefore, be expected, under the RSA, to implement the reductions set forth in Attachment 10. Tr. vol. 2, p. 203, line 19 to p. 204, line 13.

B. The Emission Reduction Provisions of the RSA Are Directly Contrary to the Policies Set Forth in the DPU'S May 1, 1996 Order in D.P.U. 96-100 with Respect to Environmental Quality.

1. The emission reduction provisions of the RSA are not part of a coordinated regional effort and will not achieve any environmental benefit but will result in serious competitive impacts in Massachusetts.

Part III-I of the DPU's May 1, 1996 order in D.P.U. 96-100 set forth the policies that the DPU proposed to follow with respect to environmental issues in restructuring. One of the key policies is the need for any emission

reduction requirements to be part of a coordinated regional approach. As stated on pages 34-35 of that order:

> There is a compelling need for regional cooperation among utilities and environmental regulators in order to minimize any potential negative environmental impacts of electric industry restructuring. The benefits of introducing greater competition into the electric industry will be diminished if restructuring efforts are not consistent with achievement of environmental quality goals. The Department seeks to establish economic regulatory policies that are consistent with other efforts at the state, regional, and federal levels to achieve environmental quality goals in a restructured electric industry. [Footnote omitted, emphasis supplied.]

The need for a regional approach to emission reduction in the DPU's view reflects both competitive and environmental concerns. With respect to the competitive necessity of a regional emissions approach, page 37 of the May 1, 1996 policy statement in D.P.U. 96-100 noted "the Department's goals of ensuring full and fair competition, and applying rules to all competitors fairly." And restructuring principle 6 in the Department's August 16, 1995 Order in D.P.U. 95-30 states that "[c]onsistent with the Department's principle of ensuring full and fair competition in generation markets, all like generating facilities should over time be subject to equivalent levels of environmental regulation, insofar as this is compatible with our cost reduction objective and does not disadvantage Massachusetts relative to other states." (Emphasis supplied).

The DPU has been equally clear in its view that a regional approach to emission reduction is environmentally necessary. D.P.U. 96-100, May 1, 1996 Order at 35-37. In recognition of this view, MECo witness Tranen testified:

> Recent air quality modeling results indicate that Massachusetts and the Northeast will not attain the ozone standards unless there are significant reductions in NO_x emission in the upwind states. Also, small particle depositions of sulfates in the Northeast will not be reduced significantly until SO_2 emissions in those same

> upwind states are reduced ... In fact, requiring deep and expensive emission reductions in Massachusetts without reductions by sources in the upwind states would increase costs here, make Massachusetts plants less competitive, and, in a competitive generation market, could actually result in cheaper and dirtier upwind sources operating more. As a result, not only would the ozone standard not be attained in the Northeast, but in fact air quality could become worse.

MECo-2, Testimony volume, p. 78, line 18 to p. 79, line 14.

While CEED disputes the views set forth in Mr. Tranen's testimony, the need for a regional approach to emission reduction, in fact, has been central to complaints voiced by policymakers, regulatory bodies, environmental organizations and electric utilities throughout the Northeast concerning the competitive and environmental impact of electric deregulation. The statement has been made over and over again that electric deregulation will hurt the Northeast both in terms of economics and air quality unless steps are taken to equalize emissions standards throughout the Northeast and Midwest. While CEED does not agree with the view that emissions from plants in the Midwest are materially contributing to ozone creation in the Northeast, plainly that view formed the basis for the DPU's insistence in its policy orders in D.P.U. 96-100 and 95-30 that Massachusetts electric plants should not be forced to "go it alone" in undertaking a new round of emission reductions. See D.P.U. 96-100, May 1, 1996 Order at 34-37.[6]

Given the oft-repeated insistence on a regional approach, it is little short of amazing that the settling parties are seeking to force emissions reductions on Salem Harbor Units 1-4 and Brayton Point units 1-2 without any assurance that the same or similar requirements will be applied to any other

[6] See footnote 12 below.

units. The record, in fact, shows that DPU approval of Attachment 10 of the RSA would lead to exactly the type of competitive harm without environmental benefit that DPU 's policies were designed to avoid.

The competitive harm from Attachment 10 of the RSA is obvious. Five of NEP's six coal-fired generating units would be subjected to deep emission reductions requirements while other fossil-fueled units would not. NEP's coal-fired units supply some of the lowest-cost electricity in the region, helping MECo provide the lowest retail rates among investor-owned utilities in the Commonwealth. CEED-3, p. 10. These units all operate at extremely high capacity factors, trailing only some nuclear units and Holyoke Water and Power's Mount Tom station in New England. Id. The RSA would competitively disadvantage these plants by increasing their cost of operation with the result that they would become less competitive with fossil-fueled plants located outside of Massachusetts. In fact, the increased cost of the emission controls imposed by the RSA could have a present value of up to $150 million.[7]

The lack of environmental benefit from Attachment 10 is also obvious. MECo witness on environmental issues, Andy Aitken, agreed with all of the following statements:

- All of the Salem Harbor and Brayton Point Units are currently operated and are expected to continue to operate in compliance with all applicable air quality laws and regulations that are on the books today. Tr. vol. 4, p. 140, lines 9-18.

- All of Massachusetts is in compliance with EPA's air quality standards for SO_2 and NO_2. This means that, in EPA's view, ambient concentrations of SO_2 and NO_2 are not causing damage to human health with an adequate margin of safety. EPA recently completed a review of these standards and found no scientific basis to change them. Tr. vol. 4, p. 140, line 19 to p. 142, line 3 and p. 145, line 7 to p. 146, line 17.

[7] See DPU-RR-22 and CEED attachment 6 thereto.

- No quantified information exists showing the effect on ambient SO_2 concentrations of reducing SO_2 emissions at Brayton Point and Salem Harbor. Similarly, no quantified information exists setting forth the geographic location in which emissions from Brayton Point and Salem Harbor are deposited. Tr. vol. 4, p. 142, lines 4-12, p. 164, lines 13-23.[8]

- It is possible that the new owners of Salem Harbor and Brayton Point (following divestiture) would meet the SO_2 emission reduction requirements of the RSA by purchasing and retiring SO_2 credits. To the extent emissions credits are used, SO_2 control equipment will not be installed at Brayton Point and Salem Harbor and, therefore, SO_2 emissions from those units will not be reduced as a result of the RSA. Moreover, SO_2 emissions credits are entirely fungible and, therefore, it will not be possible to know the identity of the electric generating units that reduced emissions of SO_2 in order to create the credits that will potentially be used by the new owners of Brayton Point and Salem Harbor. As a result, it cannot be determined whether Attachment 10 of the RSA will result in SO_2 emission reductions being made at plants in or even upwind of Massachusetts. Tr. vol. 4, page 142, line 13 to p. 144, line 21.

- Massachusetts is not in compliance with EPA's air quality standard for ground level ozone. Ground level ozone occurs as a result of complicated chemical reactions in the air. Both NO_x and volatile organic compounds (VOCs) acting together are precursors of ground level ozone. Ground level ozone in Massachusetts is a problem during the "ozone season," meaning the warmer months of the year. Ground level ozone does not exceed EPA standards in the colder months of the year. The RSA, however, would require reductions of NO_x emissions year round, not just during the ozone season. (By contrast, the Memorandum of Understanding of the Ozone Transport Commission would require reductions of NO_x emissions only during the ozone season). Reductions in NO_x emissions during the non-ozone season would not result in reducing ground level ozone during the ozone season because a particle of NO_x is not long-lived in the air. Thus, the requirement of the RSA that NO_x emissions be reduced in the non-ozone season would achieve no environmental benefit. Tr. vol. 4, p. 146, line 18 to p. 154, line 11.

- In the absence of emission reductions of NO_x and VOCs from other sources and other areas, it cannot be said that reducing NO_x emissions from Brayton Point and Salem Harbor will have any impact

[8] Salem Harbor is right on the Massachusetts coast. It is, therefore, likely that much if not most of its emissions are deposited in the Atlantic Ocean, particularly if the belief of some is correct that emissions are transported great distances before being deposited.

> on ground level ozone in Massachusetts even during the ozone season. The amount of NO_x emitted from Salem Harbor and Brayton Point is simply not great enough compared with all sources of NO_x and VOCs in the region to make a difference. In fact, in the absence of emission reductions of NO_x and VOCs from other sources and other areas, it is entirely possible that reducing NO_x emissions from Brayton Point and Salem Harbor will actually result in an increase in ground level ozone near the units because in certain cases reducing NO_x emissions can create an ozone "disbenefit." Tr. vol. 4, p. 164, line 24 to p. 166, line 11.

In sum, as seen, the lack of regional approach in the RSA means that Massachusetts electric generation and Massachusetts ratepayers will be competitively disadvantaged for no environmental gain. The parties who signed the RSA evidently believe that the Brayton Point and Salem Harbor units should lead the way in the region (and the nation) in emission reductions. But unless the DPU can be sure that emission reductions are part of a coordinated and comprehensive strategy, nothing positive and a great deal negative will result for Massachusetts ratepayers. That is what DPU policy says and that policy is what should be followed in this case.

2. The emission reduction provisions of the RSA are directly contrary to the DPU's policy of excluding from stranded investment the going-forward cost of compliance with environmental requirements.

The May 1, 1996 Order in D.P.U. 96-100 at 38 clearly states that:

> In the interest of establishing a level playing field in generation, the Department has previously determined that electric companies will not be allowed to collect going-forward costs for environmental compliance in their stranded cost recovery mechanisms. Instead, all plant owners should bear the going-forward cost of existing

requirements as well as the risk of future environmental controls.

(Emphasis supplied.)

In a footnote to the above quotation, the DPU noted that in D.P.U. 95-30, at 32, the DPU did not include environmental compliance costs in its definition of stranded costs. The footnote also stated that in DPU's environmental externality docket, D.P.U. 91-131, at 114, DPU found that "project proponents, not ratepayers, should assume the risk of future environmental regulation and bear the costs of compliance with such regulation."

Like the DPU's policy in favor of regional approaches to environmental regulation, the DPU's policy that stranded cost should not include the cost of future environmental compliance was abandoned in the RSA. As testified to by MECo's witnesses, the RSA guarantees MECo recovery of a "contract termination charge" (the stranded cost charge of terminating MECo's power supply contract with NEP) of $.028 per killowatthour for three years and declining thereafter. This charge will be reduced to the extent of proceeds realized in the sale of NEP's generating assets. As a result, under the RSA, the higher the proceeds from the sale of generating assets, the lower the contract termination charge will be. Conversely, the lower the proceeds from the sale of generating assets, the higher the contract termination charge will be. Thus, as MECo's witness testified, to the extent the emission reduction provisions of the RSA lower the proceeds from the sale of generating assets, the result will be that ratepayers will pay increased stranded investment by, in effect, funding the going-forward cost of environmental compliance. Tr. vol. 2, p. 202, line 5 to p. 203, line 4; p. 214, line 22 to p. 216, line 16.

It would seem fairly evident that the emission reduction provisions of the RSA will, in fact, lower the proceeds from the sale of generating assets and therefore burden ratepayers with increased stranded investment. As noted, MECo's witnesses testified that the emission reduction requirements are "deep and expensive" and would require the expenditure of "large amounts." MECo-2, Testimony volume, p. 78, line 18 to p. 79, line 14. Any purchaser of Brayton Point and Salem Harbor would therefore be required to expend large sums to implement the emission reductions.[9] Such purchasers, logically, will offer less money for these units than they would if they were not required to spend such large sums on emission reductions. As noted, the cost of the emission reductions could have a present value of up to $150 million.

An unwritten part of Part III of the RSA seems to require its proponents to pretend that the "deep and expensive" emission reductions required at Brayton Point and Salem Harbor will not actually reduce the purchase price received for those units. Both MECo's and the Conservation Law Foundation witnesses testified to this effect. See, e.g., Tr. vol. 2, p. 205, line 15 to p. 206, line 1.

This is a particularly interesting argument for MECo to be making. After all, as noted, in its original February 1996 "Choice: New England" proposal, which did not include divestiture, and under which NEP itself would have made the proposed emissions reductions, those reductions were characterized as "deep and expensive," requiring the expenditure of "large sums." Now, under the RSA, where a third party will make the reductions, and

[9] As noted, all four Salem Harbor units would be required to implement emission reductions by 2000. With divestiture scheduled under the RSA for January 1, 1998, the purchaser of Salem Harbor would be faced with an immediate need to expend large sums for emissions reductions.

where ratepayers rather than NEP or MECo will bear the risk that the third party will lower its purchase price as a result, we are supposed to believe that the emissions reductions are no longer economically significant. The argument seems to be that the cost of the emission reductions is magically going to disappear under the RSA.

In judging the claim that "deep and expensive" emissions reductions will not lower the purchase price for Brayton Point and Salem Harbor, the DPU should keep three things in mind.

First, MECo has not performed any real analysis to support such claim. It does not have any independent or even written studies to support its position in this regard. Tr. vol. 2, p. 205, lines 15-17. Moreover, as MECo is the first to admit, no one can say for sure how much NEP will receive from the sale of its units. Indeed, NEP does not even know whether it will sell all of its generating assets as one package or sell them off as separate parts. Tr. vol. 2, p. 203, lines 5-18; p. 209, lines 1-14. The Company's view that the emission reduction provisions of the RSA will not lower the proceeds of divestiture, therefore, is highly tentative and uncertain, at best.

Second, in contrast, it can be said for certain that there is at least a very substantial risk that the emissions reductions requirements of the RSA will result in a reduction of the proceeds of the sale of the generating assets. Anyone who argues otherwise - who argues that they know that "deep and expensive" emissions requirements will not cause a reduction in the price a buyer is willing to pay for these units - is either fooling themselves or

trying to fool this Department.[10] The RSA, therefore, at least, creates a very substantial risk that ratepayers will become responsible for bearing the going-forward cost of environmental compliance as stranded cost.[11]

Third, on cross-examination, MECo's witness argued that, even if the emission reduction provisions of the RSA did increase stranded cost, such increase would not be material enough to upset the RSA in light of the other benefits received by ratepayers under that agreement. MECo's witness testified that MECo would not consider increased stranded cost from the emission reductions provision of, hypothetically, $50 million to be significant enough to warrant second-guessing the RSA.

But this kind of testimony creates a logical dilemma for MECo. As stated, the DPU has already decided its policy that the ratepayers should not pay any cost of future environmental compliance as stranded investment. If $50 million, or whatever the increased stranded cost will be, is not considered to be a significant amount of money in light of other portions of the RSA, then the Company's shareholders should pay for it. If it is too much

[10] See Tr. vol. 2, p. 211, line 20 to p. 212, line 2, where MECo witness Jesanis testified:

Q:So what we are dealing with here are possibilities. It is possible that these emissions reductions proposals will tend to reduce the market price of the units. It is possible that it won't reduce the market price of the units. Is that where we're coming out?

A: [Jesanis] I think that's right.

[11] Compare this result to MECo's original February 1996 Choice: New England proposal where there was assurance that ratepayers would not pay the cost of the emission reduction provisions as required by this Department's policies. Under that proposal, the risk that market prices for the sale of electricity would be too low for the Company to recover its investment in emissions controls was squarely on the Company. Under the RSA, in contrast, the risk that there will be a reduction in the market price the Company will receive for the sale of its assets because of the emission control provisions of the RSA is squarely on the ratepayers. Tr. vol. 4, p. 169, line 14 to p. 175, line 24.

money for the Company's shareholders to pay, then the Company should not have agreed to it.

Moreover, the potential increase in stranded investment caused by the emission control provisions is a great deal of money indeed. As noted, Mr. Hewson estimated that the increase could have a present value of up to $150 million, which is a lot of money in any context. That sum is in addition to other increased costs being passed on to ratepayers under the RSA for environmental considerations. As discussed below, the stranded cost of overmarket existing QF and renewable contracts being passed on to ratepayers exceeds $1.5 billion. As also discussed below, the increased cost to ratepayers of new renewables to be funded with the proposed stranded benefits charge is likely to be nearly $50 million just between 1998 and 2001. In this context, adding another $150 million (just in present value) or any other amount in stranded costs for emission controls cannot be dismissed as insignificant.

Fourth, the emission control requirements of the RSA will not only increase stranded cost for ratepayers, it will increase electric rates as well. By increasing the cost of operating Brayton Point and Salem Harbor, the emission control requirements will increase the price of all electricity sold in Massachusetts during the periods of time when those units are setting the marginal price of electricity. CEED-1 at 8.

In sum, the emission reduction requirements of the RSA will result in material increases in stranded cost borne by ratepayers. Such a result is squarely at odds with the DPU's policy that ratepayers should not pay for

future environmental compliance. The emission reduction provisions of the RSA, therefore, should be rejected.[12]

C. The DPU Lacks Authority to Approve the RSA with the Emission Reduction Provisions Included.

It is beyond dispute that DPU cannot enter an order that purports to legally compel NEP to reduce emissions at the Brayton Point and Salem Harbor units in order to improve environmental quality. In Massachusetts Electric Company v. Department of Public Utilities, 643 N.E. 2d 1029 (Mass. 1994) ("MECo v. DPU"), the Supreme Judicial Court of Massachusetts, in striking down

[12] Because CEED's opponents often subscribe to the attack the messenger method of argumentation, it may be helpful to discuss CEED's interest and motivations in this proceeding. The nature of CEED's membership is described in CEED's petition to intervene in this docket. CEED is participating in this Department's restructuring proceedings, and in the restructuring proceedings of various other state public service commissions, because it does not believe environmental policy should be set by individual state electric regulatory bodies, particularly in the context of industry restructuring. Electric regulatory bodies have neither the expertise nor the legislative mandate to resolve the complicated issues raised by environmental regulation.

In fact, environmental policy should be, and is, being established by state, regional and federal bodies of appropriate jurisdiction, including Congress, the Ozone Transport Commission, the Ozone Transport Advisory Group and EPA (the last of which recently proposed tough new fine particulate and ozone standards). CEED believes that some of the standards and controls currently being proposed by these bodies are inappropriate or unnecessary; in particular, CEED does not believe that ozone transport is as serious as some have asserted, and CEED believes that mobile sources are the key cause of ozone problems in the Northeast. But CEED does not dispute that environmental regulatory bodies are the appropriate bodies to be resolving these issues. Obviously, the country needs environmental regulation and for that reason has established environmental agencies to determine the necessary quantum of that regulation.

The RSA is a perfect example of why environmental issues should not be decided by state economic regulators. The emission reduction provisions of the RSA grew out of concerns, discussed above, that have been widely expressed in the Northeast about interstate competitive and economic consequences of electric restructuring vis-a-vis the Northeast and Midwest. Those concerns are being and will be addressed in appropriate environmental bodies (and CEED and a number of other parties in this proceeding will assert their various positions before those bodies). But if the DPU, with its narrow jurisdiction, attempts to implement its own environmental solutions to the inherently interstate issue of electric restructuring, as by adopting the emission reduction provisions of the RSA, it will simply create the result described above: no environmental gain at the cost of increased stranded cost burden for ratepayers.

DPU's environmental externalities regulations, ruled that the DPU is without authority to engage in environmental regulation.

In its May 1, 1996 Order in D.P.U. 96-100 at 37, the DPU stated that it "encourages the inclusion of voluntary emission reduction provisions in electric company restructuring plans." Perhaps in response to this statement, the parties to the RSA characterize the emission reduction provisions in Attachment 10 as purely "voluntary" on the part of MECo/NEP. The view seems to be that DPU approval of the RSA, including emission reduction provisions, would not be an impermissible exercise of environmental regulation by the DPU because the emission reduction provisions were "volunteered" by MECo, not mandated by DPU.

In fact, approval of the RSA with the emission reduction provisions included would be an impermissible exercise of environmental regulation by the DPU for the following four reasons.

1. The emission reduction provisions of the RSA were not truly "volunteered" by MECo/NEP.

It is axiomatic that an agency cannot do indirectly what it cannot do directly. See, e.g., Dwyer v. United States, 716 F. Supp. 1337, 1340 (S.D. Cal. 1989). Plainly, the emissions reductions in the RSA result from impermissible indirect environmental regulation by DPU.

The only reason MECo "volunteered" the emission reductions in the RSA was because MECo believed that such reductions are responsive to the DPU's policy favoring "voluntary" emissions reductions. Tr. vol. 2, p. 193, line 23 to p. 194, line 15. According to MECo, "voluntary" emissions reductions were included in the RSA "to improve the chances that the Department would view the

settlement favorably." Tr. vol. 2, p. 195, lines 7-8. And MECo has great need for the Department to view the RSA favorably. Obviously, one of MECo's key objectives in the RSA is to obtain DPU approval of full stranded cost recovery. MECo's witnesses testified that virtually anything less than the full stranded cost recovery provided in the RSA would result in defaults on the Company's bonds and potential bankruptcy. Tr. vol. 4, p. 197, lines 11-19.

In this context, with the stranded cost issue being something like a gun pointed at the Company's head, the notion that the Company "volunteered" emissions reductions is ridiculous. In deciding to "volunteer" emissions reductions, the Company determined that DPU wanted emissions reductions and that the Company's prospects of receiving full stranded cost recovery might very well depend on such reductions. As testified by MECo Executive Vice-President Richard Sergel:

Q.Can you see the company agreeing to these emissions reductions requirements in the context of electric restructuring unless there is full stranded cost recovery?

A.[Sergel] No.

In sum, the emissions reductions offered by MECo in the RSA are the direct result of DPU policies favoring such reductions. Those policies and the foreseeable result of those policies (that is, the emissions reductions) cross the line into coercive and impermissible environmental regulation.

2. Whether or not MECo's agreement to the emissions reductions in the RSA is truly voluntary, MECo's approval of the RSA including the emissions reductions would represent

environmental regulation by DPU in contravention of MECo v. DPU.

The essence of the court's ruling in MECo v. DPU is that DPU is an economic rather than an environmental regulator and must base its decisions on economic rather than environmental factors. As stated by the court, "[t]he department does not have delegated authority to consider the overall impact of pollution on society in the course of carrying out its regulatory function." 643 N.E.2d at 1034.

The inclusion of the emission reduction provisions in the RSA, however, necessarily means that a DPU decision approving the RSA will be based on environmental as well as economic considerations in violation of MECo v. DPU. The settling parties have taken the position that the emission reduction provisions are among certain integral parts of the RSA which must all be approved or else the entire agreement fails. Transcript of November 7, 1996 Procedural Conference, p. 22, line 20 to p. 23, line 14. In other words, according to the settling parties, the emission reduction provisions are one part of a package deal, and the deal in its entirety is in the public interest. If the emission reduction provisions are removed from the deal, the deal fails and the RSA, according to its proponents, would no longer be in the public interest.

But the only reason the emission control provisions are in the RSA is because of the environmental benefit those provisions assertedly would create for society at large.[13] Accordingly, the position being presented to the DPU

[13] It is sometimes argued that emission reductions are within the jurisdiction of public service commissions because it can be economically prudent, in light of concern for future environmental regulation, to lower emissions now. Any validity this argument may have for the DPU as to Brayton Point and Salem Harbor is eliminated by the deregulation and divestiture contemplated by the RSA. The

is that such societal interest must be protected - the emission control provisions must be a part of the RSA - in order for the RSA to be in the public interest. That position, inescapably, requires the DPU to consider the asserted environmental benefits of the RSA as a part of its determination of the public interest, in contravention of MECo v. DPU.

3. The RSA violates MECo v. DPU because it would lead to increased costs and rates for environmental reasons.

The Court in MECo v. DPU was absolutely clear that the Department may not order increased costs and rates because of environmental concerns:

> Where we disagree with the Department (as a matter of legal principle but not as a matter of environmental policy) is the department's conclusion that increased costs (and hence higher rates) are justified solely because of the potential or real effect of pollution on other than ratepayers, or, as the department put it, on "the rest of society in the form of increased health care expenses, economic impacts on material and agricultural resources, and a reduced quality of life.

643 N.E. 2d at 1034.

But the RSA will increase utility costs and rates just as surely as the use of environmental externalities under consideration in MECo v. DPU would do so. As noted, the cost of the emission controls could have a present value of up to $150 million with a corresponding impact on rates through stranded investment. As also noted, the sole purpose of these controls is to benefit environmental quality. Such controls, therefore, are not valid under MECo v. DPU.

4. Approval of the RSA would mean that the DPU would become responsible for administering compliance with the emission

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generation and sale of electricity from those units will no longer be under the jurisdiction of the DPU pursuant to the RSA. There can, therefore, be no justification for the emission control provisions of the RSA other than improvement of environmental quality for society as a whole.

control requirements, a result that would impermissibly intrude the DPU into environmental regulation.

Approval of the RSA would mean that its terms and conditions would become subject to the Department's jurisdiction. Disputes under the RSA's provisions for emission reduction, therefore, would be decided by the Department. If NEP simply breached its obligation to condition sale of Brayton Point and Salem Harbor on the buyer's implementation of the emission reductions, the remedy would be before the Department. Or, if there were a dispute on the meanings of the terms and conditions of the RSA provisions on emission reductions, the Department would be required to resolve the dispute. These disputes could involve technical environmental matters, such as determination of emission reduction "triggers" (see item 9 on page 3 of Attachment 10 to the RSA) or measurement of compliance with emission reduction formulae (see item 4 on page 2 of Attachment 10 to the RSA).

The Department would, as a result, become an environmental regulator. Such a role exceeds the Department's jurisdiction under MECo v. DPU.

In sum, the Department is without legal authority to approve the RSA with the emission reduction provisions included.

II. THE RENEWABLE RESOURCE PROVISIONS OF THE RSA SHOULD BE REJECTED.

CEED opposes the renewable mandates of the RSA for the same reasons CEED has opposed renewable mandates previously in comments filed before this Department.[14] CEED would add only two additional points.

[14] See CEED comments filed in this docket dated April 11, 1996, May 24, 1996 and October 29, 1996.

First, the DPU needs to understand the huge amounts of money it is requiring ratepayers to pay for overmarket renewables. The RSA would have ratepayers pay **$1.489 billion (!)** in stranded cost for existing QF and other alternative energy contracts.[15] The subsidy contained in the RSA for new renewables during the period 1998-2001 would cost ratepayers another $49 million.[16] CEED questions exactly what it is ratepayers are receiving for this money. Despite the millions spent by Massachusetts ratepayers on existing QF and alternative energy contracts, these contracts do not provide a significant portion of energy for the Commonwealth and exist only because of the ratepayer subsidy. The new round of renewable subsidies proposed in the RSA will lead to the same result: much money spent for little benefit.

Second, CEED proposes that the 4% renewables target of the RSA be eliminated. It is one thing to continue past subsidies for renewables for a limited period of time in order to provide a transition for renewables to the competitive market. This was California's rationale in continuing subsidies

[15] MECO-1, Book 2, page 77, column 5 indicates that the contract termination charge which MECo seeks to recover from ratepayers includes "excess over market payments" to third party power supply contractors totaling $3.5 billion. The power contracts from which these excess over market payments result are set forth on page 70 of the same volume. The Company's contracts for power generated <u>just from</u> landfill, refuse, biomass and wind resources (not including large or small hydro) listed on page 70 are the Northeast Landfill, Turnkey Rochester, Ogden Haverhill, RESCO Saugus, RESCO North Andover, Signal Milbury, Barre Landfill, Genesis Johnston, Nahus Landfill, Plainville Landfill, Randolph Landfill and NEP Windplant 1 Phases 1, 2 and 3 contracts. The $1.489 billion figure was derived by totalling up the revenues that will be paid from these contracts as shown on page 70 and subtracting from that total the market price projected by the Company for the kwh to be purchased under those contracts. The kwh to be purchased under those contracts is shown on page 71 of Book 2 of MECo-1. The market price projected by the Company is shown on page 34 of the "Workpapers of M.E. Jesanis Supporting Contract Termination Charges" attached to Union 1-1. See Tr. vol. 2, p. 223, line 10 to p. 225, line 22 in which MECo witness Jesanis indicates that these calculations are the ones that would show the stranded cost charge which MECo is seeking to pass on to ratepayers for existing QF, renewable resource and alternative energy contracts.

[16] Derived by multiplying the mills/kwh figures set forth on page 24 of the RSA by the kwh figures in MECO-1, Book 2, schedule 1, page 62, column 2.

for renewables for a limited four-year period. It is another thing entirely to commit the Commonwealth to a goal of 4% renewables by 2007. Such a goal contradicts the DPU's statement in its May 1, 1996 order, at 68-69, in D.P.U. 96-100 that the Department opposes "approaches that require regulatory intervention to maintain a particular level of renewables in the market."

The cost of achieving this goal is uncertain. CEED and the Union of Concerned Scientists submitted conflicting testimony as to the cost of new renewable resources.[17] It can be said, however, that the incredibly inflated excess over market payments for QF and alternative energy that the RSA would pass on to ratepayers as stranded cost under the RSA do not purchase near enough renewables to meet the 4% goal (hence the asserted need for the goal). At a certain point, enough should be enough. Renewables need to be able to demonstrate that they can eventually compete in the competitive market that this Department is intent on creating. It should not be the role of this Department to use ratepayer money to create a market for renewables indefinitely.

III. REFORM OF THE SITING LAW AS PROPOSED IN THE RSA IS ALSO NOT IN THE PUBLIC INTEREST.

As a final matter, CEED opposes the portion of Part III of the RSA proposing to reform the energy facilities siting law in a way which deletes the existing least cost and need requirements but which gives a preference for "clean energy technologies." In a restructured industry, the only purpose of a siting law should be to protect against local environmental impacts. If a plant does not produce local, site-specific environmental impacts - and

[17] CEED's views are contained in CEED 1-1 and CEED 1-2.

otherwise meets the terms of the Commonwealth's and the nation's environmental laws designed to protect society at large - there is no reason why the plant should not be given a siting permit.

CONCLUSION

CEED has no position for or against the RSA or any of the critical restructuring issues facing this Department such as stranded cost and divestiture. The one exception is the environmental quality provisions contained within Part III of the RSA. As proposed, these provisions will produce no environmental

gain but will result in tremendous cost to ratepayers. Part III of the RSA should be rejected.

Dated: December 18, 1996 Respectfully submitted,

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